United States Court of Appeals

for the Second Circuit

REPLY BRIEF

NO. 75-4155

United States Court of Appeals

FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

COLUMBIA UNIVERSITY,

Respondent.

On Application for Enforcement of an Order of
The National Labor Relations Board

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

ROBERT G. SEWELL,
MARJORIE S. GOFREED,
Attorneys,
National Labor Relations Board.
Washington, D.C. 20570

JOHN S. IRVING,
General Counsel,
JOHN E. HIGGINS, JR.,
Deputy General Counsel,
ELLIOTT MOORE,
Deputy Associate General Counsel,
National Labor Relations Board.

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REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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1. The main thrust of the University's brief is that the Administrative Law Judge's credibility resolutions, adopted by the Board, should be reversed. This contention collides with long-standing precedent establishing that responsibility "for appraising conflicting and circumstantial evidence, and the weight and credibility of testimony" rests with the Board (*N.L.R.B. v. Link-Belt Co.*, 311 U.S. 584, 597 (1941), that the Board must give considerable weight to findings of an Administrative Law Judge based upon the "bearing and delivery" of witnesses who

testify before him (*N.L.R.B. v. Universal Camera Corp.*, 190 F.2d 429, 430 (C.A. 2, 1951) and that judicial review of the Board's findings does not involve a trial *de novo* (*Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 488 (1951). Accordingly, it is axiomatic that this Court will not upset a decision of the Board:

> when it accepts a finding of an [Administrative Law Judge] which is grounded upon (a) his disbelief of an orally testifying witness's testimony because of the witness's demeanor or (b) the [Judge's] evaluation of oral testimony as reliable, unless on its face it is hopelessly incredible or flatly contadicts a so-called law of nature" or undisputed documentary testimony.

N.L.R.B. v. Warrensburg Board & Paper Corp., 340 F.2d 920, 922 (C.A. 2, 1965), quoting from *N.L.R.B. v. Dinion Coil Co.*, 201 F.2d 484, 490 (C.A. 2, 1952). Despite these well established principles, the University now seeks a *de novo* hearing on the credibility of witnesses.

For example, the University contends that the Administrative Law Judge erred in crediting Cornell's testimony, supported by Hirschfeld's, that Supervisor Lawton called them into her office at 12 noon on January 21 and outlined new rules for answering the telephone (Br. 6). In support of its contention, the University asserts (Br. 7-12) that Lawton emphatically denied that she made any changes in the work rules and that her testimony as to this was corroborated by every other employee witness. As the Administrative Law Judge found, however, Lawton did not deny calling Cornell and Hirschfeld into her office on January 21 and criticizing their telephone-answering procedures (A. 33).[1] Moreover,

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[1] The relevant portions of Lawton's testimony are as follows (A. 213):

(continued)

he found that Lawton's testimony was "somewhat vague" in many respects and "where precise, was frequently brought out by leading questions on the part of Respondent's counsel" (A. 34). By contrast, he found that Cornell, although somewhat militant and self-assertive, "recited facts, clearly emphatically and in great detail" (A. 34). Accordingly, on the basis of demeanor, he concluded that Cornell exaggerated the situation somewhat, but nevertheless gave a reliable statement of the facts.

The University also contends (Br. 14-23) that the Administrative Law Judge erred in crediting Cornell's and Hirschfeld's testimony about their concerted activities over that of other employees. The short answer to this contention is that the other employees either corroborated Cornell and Hirschfeld in substantial part or failed to effectively rebut their testimony. Thus, Cornell credibly testified that, following the noon meeting with Lawton, she and Hirschfeld told employees Barbara Joyce, Marian Lloyd, Gwen Giscomb, Roxanna Brandao and Betsy Reed that they were upset by Lawton's "continually changing policy", that Joyce and Giscomb also voiced grievances, and that she said that their grievances should be brought to Lawton's attention and that she intended to form a grievance committee and speak to Lawton about them (A. 80-82). Her testimony was paralleled by Hirschfeld's (A. 162-163) and was

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[1] (continued)

Q. Did you ever change any of the nine rules listed in General Counsel's Exhibit 7? A. No, I have not.

Q. Did you ever call Muriel Hirschfeld or Drucilla Cornell in your office on January 21 to tell them of the new rules or regulations?

MR. ROSENBERG: Objection this is leading.

ADMINISTRATIVE LAW JUDGE FRIEDMAN: Sustained.

Q. Did you ever discuss any rules or regulations with Muriel and Drucilla Cornell after they were hired? A. No.

Q. Did you ever change the rules? A. No.

additionally corroborated by Joyce's (A. 139-140).[2] Moreover, it was supported in part by Brandao's grudging admission that "during that time there might have been something saying that they wanted to go to Mrs. Lawton" (A. 237-238).

Furthermore, testimony from Lloyd and Reed does not significantly support the University's position. For while it is true that Lloyd stated on direct examination that Cornell did not tell her about the noon meeting with Lawton or discuss employee grievances with her, Lloyd conceded on cross-examination, "There may have been [such] a discussion that I might have partaked in, but I don't remember what, because we were always talking about something" (A. 241-242). Finally, Reed's testimony was limited to the statement that nobody approached her or asked for her opinion about forming a grievance committee and she heard no conversations among the employees as to their dislike of regulations that had just come down that day (A. 155, 157). This being the case, the Administrative Law Judge reasonably concluded, on the basis of demeanor and other relevant factors, that Cornell was a generally reliable witness (A. 34).

The Administrative Law Judge reached the same conclusion with respect to Cornell's testimony that she and Hirschfeld discussed the formation of a grievance committee with night shift employees on January 21 and 22 (A. 34-36). In so doing, he noted that Cornell and Hirschfeld were both inaccurate in stating that employees George Ford and Morris

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[2] Joyce testified that when she returned from lunch that day, Lloyd, Giscomb, and Brandao were engaged in a discussion with Cornell and Hirschfeld concerning Lawton's "rules and regulations", that she stated her resentment at having to raise her hand to go to the bathroom and that Cornell said that they should have a grievance committee and was going to do something about it (A. 139-140, 145).

Dunlop were present on January 21. However, he found it more significant, in assessing Cornell's credibility, that Dunlop testified that there was a discussion of a "union" on January 22, that he heard that someone had put up a notice that Lawton did not like, and that he remembered telling Cornell and Hirschfeld to be careful of what they were doing because they might be discharged (A. 253-254, 256). The Judge also found it significant that Ford could not "remember" whether such a discussion had taken place (A. 248). He therefore concluded that Cornell's testimony was not substantially impugned.

On the basis of such a record and the Judge's painstaking appraisal of conflicting evidence, we submit that the University cannot reasonably contend that the Administrative Law Judge "evaluated the testimony of various witnesses by uneven and inconsistent standards", "ignored or artificially harmonized contradictory evidence", and made findings which "are not supported by substantive evidence considering the record as a whole" (Br. 4-5).

2. The Company (Br. 54-55) objects to that portion of the Board's order requiring it to cease and desist from:

> In any other manner interfering with, restraining or coercing its employees in the exercise of their rights to self-organization, to form labor organizations, to join or assist any labor organization, to bargain collectively with representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activities.

In the Company's view, this paragraph is too broad and should be deleted in its entirety.

The relevant principles were set out in *N.L.R.B. v. Express Publishing Co.*, 312 U.S. 426, 436-437 (1941):

> Having found the acts which constitute the unfair labor practice, the Board is free to restrain the practice and other like or related acts. . . . To justify an order restraining other violations it must appear that they bear some resemblance to that which the employer has committed or that the danger of their commission in the future is to be anticipated from the course of his conduct in the past.

In the instant case, the Board made a clear finding that the University discharged Cornell because she insisted upon and in fact exercised her statutory right to join together with other employees to present grievances to their employer, to form an employee committee and to bargain with the employer in much the same way that a union would (A. 42-43). The Board further found that the discharge was not the result of a personal antipathy between Cornell and her supervisor but a deliberate attempt by the supervisor to assert her authority and to nip those activities in the bud (A. 42-43). Finally, the Board found that the discharge penalty exacted by the supervisor, and the University's refusal to rectify it by offering unconditional reinstatement, indeed went to the "very heart of the Act." (A. 4-5). *N.L.R.B. v. Entwistle Mfg. Co.*, 120 F.2d 532, 536 (C.A. 4, 1941). Accordingly, the Board's order, though couched in statutory language and containing the words "in any other manner", is warranted by the circumstances presented here. It simply advises other employees that they will not be subject to any type of employer interference if they choose to follow Cornell's example and exercise their basic organizational rights. Moreover, it is necessary because of the likelihood that serious misconduct, once committed, will be repeated unless checked. For these reasons, we submit that the quoted section of the Board's order

should neither be deleted nor cut back. Cf. *N.L.R.B. v. Express Publishing Co., supra,* 312 U.S. at 438-439; *Trico Products Corp. v. N.L.R.B.,* 489 F.2d 347, 354 (C.A. 2, 1973).

3. Finally, the University seeks to be relieved of the notice-posting obligation imposed by the Board's order. However, its exceptions to the Administrative Law Judge's recommended order merely stated that the Judge "erred in ordering the Notice to Employees to be posted as written" (*infra,* S.A. 1). Having thus failed to raise the issue before the Board, the University is barred by Section 10(e) of the Act from raising it for the first time before the Court. *N.L.R.B. v. District 50, United Mine Workers of America,* 355 U.S. 453, 463-464 (1958). In any event, the University is not entitled to the relief sought. Posting the appropriate notices is essential if employees are to know that the University will not discrminate against them, as it did against Cornell, for exercising their protected rights. *N.L.R.B. v. Falk,* 308 U.S. 453, 462 (1940). Moreover, it is a "proper and accepted" remedy. *N.L.R.B. v. Better Val-U Stores of Mansfield, Inc.,* 401 F.2d 491, 493 (C.A. 2, 1968).

CONCLUSION

For these reasons and the reasons stated in our opening brief, we submit that the Board's order should be enforced in full.

ROBERT G. SEWELL,
MARJORIE S. GOFREED,
Attorneys,
National Labor Relations Board.
Washington, D.C. 20570

JOHN S. IRVING,
General Counsel,
JOHN E. HIGGINS, JR.,
Deputy General Counsel,
ELLIOTT MOORE,
Deputy Associate General Counsel,
National Labor Relations Board.

March 1976.

SUPPLEMENTAL APPENDIX

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of:	:	
COLUMBIA UNIVERSITY	:	
and	:	**No. 2-CA-13225**
DISTRICT 65, DISTRIBUTIVE WORKERS OF AMERICA,	:	

[File Exec. Sec. 0 – File in Formal File A]

Employer's Statement of Exceptions to
Administrative Law Judge's Decision

* * * * *

51. The Administrative Law Judge erred in finding, as a conclusion of law, that Respondent by discharging, and then revoking the discharge and suspending and finally discharging Drucilla Cornell violated Sections 8(a)(1) and 2(6) and (7) of the Act (ALJD p. 26, l. 37-41).

52. The Administrative Law Judge erred in ordering the Notice to Employees be posted as written (ALJD p. 27, l. 36-37); Appendix 4).

Respectfully submitted,

Of Counsel:
Joseph R. Parauda
James J. Dean
David H. Diamond

PUTNEY, TWOMBLY, HALL & HIRSON
Attorneys for Columbia University
250 Park Avenue
New York, New York 10017

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD, Petitioner,	)	
v.	)	No. 75-4155
COLUMBIA UNIVERSITY, Respondent.	)	

CERTIFICATE OF SERVICE

The undersigned certifies that three (3) copies of the Board's offset printed reply brief in the above-captioned case have this day been served by first class mail upon the following counsel at the address listed below:

Putney, Twombley, Hall & Hirson
Att: David H. Diamond, Esq.
250 Park Avenue
New York, New York 10017

/s/ Elliott Moore
Elliott Moore
Deputy Associate General Counsel
NATIONAL LABOR RELATIONS BOARD

Dated at Washington, D. C.

this 16th day of March, 1976.